

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jun 11, 2020

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSEFINA C.,¹

Plaintiff,

vs.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:19-cv-03276-MKD

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 15, 16

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 15, 16. The parties consented to proceed before a magistrate judge. ECF No. 7. The Court, having reviewed the administrative record and the parties' briefing,

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

1 is fully informed. For the reasons discussed below, the Court grants Plaintiff's
2 motion, ECF No. 15, and denies Defendant's motion, ECF No. 16.

3 JURISDICTION

4 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

5 STANDARD OF REVIEW

6 A district court's review of a final decision of the Commissioner of Social
7 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
8 limited; the Commissioner's decision will be disturbed "only if it is not supported
9 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
10 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a
11 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159
12 (quotation and citation omitted). Stated differently, substantial evidence equates to
13 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and
14 citation omitted). In determining whether the standard has been satisfied, a
15 reviewing court must consider the entire record as a whole rather than searching
16 for supporting evidence in isolation. *Id.*

17 In reviewing a denial of benefits, a district court may not substitute its
18 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,
19 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one
20 rational interpretation, [the court] must uphold the ALJ's findings if they are

1 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674
2 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an
3 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless
4 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”
5 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s
6 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
7 *Sanders*, 556 U.S. 396, 409-10 (2009).

8 **THREE-STEP PROCESS FOR CHILDHOOD DISABILITY**

9 To qualify for Title XVI supplement security income benefits, a child under
10 the age of eighteen must have “a medically determinable physical or mental
11 impairment, which results in marked and severe functional limitations, and which
12 can be expected to result in death or which has lasted or can be expected to last for
13 a continuous period of not less than 12 months.” 42 U.S.C. § 1382c(a)(3)(C)(i).
14 The regulations provide a three-step process to determine whether a claimant
15 satisfies the above criteria. 20 C.F.R. § 416.924(a). First, the ALJ must determine
16 whether the child is engaged in substantial gainful activity. 20 C.F.R. §
17 416.924(b). Second, the ALJ considers whether the child has a “medically
18 determinable impairment(s) that is severe,” which is defined as an impairment that
19 causes “more than minimal functional limitations.” 20 C.F.R. § 416.924(c).
20 Finally, if the ALJ finds a severe impairment, the ALJ must then consider whether

1 the impairment “medically equals” or “functionally equals” a disability listed in the
2 “Listing of Impairments” (listings). 20 C.F.R. § 416.924(c)-(d).

3 If the ALJ finds that the child’s impairment or combination of impairments
4 does not meet or medically equal a listing, the ALJ must determine whether the
5 impairment or combination of impairments functionally equals a listing. 20 C.F.R.
6 § 416.926a(a). The ALJ’s functional equivalence assessment requires the ALJ to
7 evaluate the child’s functioning in six “domains.” These six domains, which are
8 designed “to capture all of what a child can or cannot do,” are as follows:

- 9 (1) Acquiring and using information:
- 10 (2) Attending and completing tasks;
- 11 (3) Interacting and relating with others;
- 12 (4) Moving about and manipulating objects;
- 13 (5) Caring for self; and
- 14 (6) Health and physical well-being.

15 20 C.F.R. § 416.926a(b)(1)(i)-(vi). A child’s impairment will be deemed to
16 functionally equal a listed impairment if the child’s condition results in a “marked”
17 limitations in two domains, or an “extreme” limitation in one domain. 20 C.F.R. §
18 416.926a(a). An impairment is a “marked limitation” if it “interferes seriously
19 with [a person’s] ability to independently initiate, sustain, or complete activities.”

20 20 C.F.R. § 416.926a(e)(2)(i). By contrast, an “extreme limitation” is defined as a

1 limitation that “interferes very seriously with [a person’s] ability to independently
2 initiate, sustain, or complete activities.” 20 C.F.R. § 416.926a(e)(3)(i).

3 **ALJ’S FINDINGS**

4 On July 28, 2016, an application for supplemental security income benefits
5 under Title XVI of the Social Security Act was filed on Plaintiff’s behalf, alleging
6 a disability onset date of May 12, 2016.² Tr. 21. The application was denied
7 initially, and on reconsideration. Tr. 158-64, 168-78. Plaintiff and her mother,
8 Maria Guadalupe G., appeared before an administrative law judge (ALJ) on March
9

10 ² On August 18, 2011, a prior application for supplemental security income
11 benefits was filed on behalf of Plaintiff, a child under age 18, with an alleged
12 disability onset date of December 3, 2000. Tr. 21. The claim was denied initially
13 on November 23, 2011, and upon reconsideration on January 25, 2012. Tr. 21. In
14 June 2013, a hearing was held on the prior claim. Tr. 21. On November 20, 2013,
15 a supplemental video hearing was held on the prior claim. Tr. 21-22. On January
16 9, 2014, the ALJ in the prior case issued a decision and found Plaintiff not disabled
17 for the entire period of August 18, 2011, the application date, through the date of
18 the decision. Tr. 22, 84-111. The Appeals Council denied Plaintiff’s request for
19 review. Tr. 22, 112-19. Plaintiff appealed and the District Court denied her
20 motion for summary judgment. Tr. 22, 120-36.

1 15, 2018. Tr. 48-83. On July 9, 2018, Plaintiff and her mother appeared by video
2 before the same ALJ for a supplemental hearing. Tr. 530-43. On October 11,
3 2018, the ALJ denied Plaintiff's claim. Tr. 15-47.

4 The ALJ noted that Plaintiff was an adolescent on the date her application
5 was filed as well as at the time of the hearing. Tr. 27. At step one of the sequential
6 evaluation process, the ALJ found that Plaintiff had not engaged in substantial
7 gainful activity since July 28, 2016, the application date. Tr. 27. At step two, the
8 ALJ found that Plaintiff had the following severe impairments: left developmental
9 dysplasia of the hip with early arthritic changes, abductor fatigue pain, and leg
10 length discrepancy status post treatment for late presenting hip dislocation and
11 triple innominate osteotomy with a femoral varus derotational osteotomy. Tr. 27.
12 At step three, the ALJ found that Plaintiff did not have an impairment or
13 combination of impairments that met or medically equaled the severity of a listed
14 impairment. Tr. 27. The ALJ then determined that Plaintiff did not have an
15 impairment or combination of impairments that functionally equaled the severity
16 of the listings. Tr. 28. As a result, the ALJ concluded that Plaintiff had not been
17 disabled, as defined in the Social Security Act, since July 28, 2016, the date the
18 application was filed. Tr. 42.

1 On October 1, 2019, the Appeals Council denied review of the ALJ's
2 decision, Tr. 1-8, making the ALJ's decision the Commissioner's final decision for
3 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

4 ISSUES

5 Plaintiff seeks judicial review of the Commissioner's final decision denying
6 her supplemental security income benefits under Title XVI of the Social Security
7 Act. Plaintiff raises the following issues for review:

- 8 1. Whether the ALJ properly evaluated the medical opinion evidence;
- 9 2. Whether the ALJ properly evaluated Plaintiff's symptom claims;
- 10 3. Whether the ALJ properly evaluated lay witness evidence; and
- 11 4. Whether the ALJ properly assessed the functional equivalence domains.

12 ECF No. 15 at 2.

13 DISCUSSION

14 A. Medical Opinion Evidence

15 Plaintiff challenges the ALJ's evaluation of the medical opinions of Perry
16 Grossman, M.D., Klane White, M.D., and Kyle Heisey, M.D. ECF No. 15 at 9-15.

17 There are three types of physicians: "(1) those who treat the claimant
18 (treating physicians); (2) those who examine but do not treat the claimant
19 (examining physicians); and (3) those who neither examine nor treat the claimant
20 [but who review the claimant's file] (nonexamining [or reviewing] physicians)."

1 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).

2 Generally, a treating physician's opinion carries more weight than an examining
3 physician's opinion, and an examining physician's opinion carries more weight
4 than a reviewing physician's opinion. *Id.* at 1202. "In addition, the regulations
5 give more weight to opinions that are explained than to those that are not, and to
6 the opinions of specialists concerning matters relating to their specialty over that of
7 nonspecialists." *Id.* (citations omitted).

8 If a treating or examining physician's opinion is uncontradicted, the ALJ
9 may reject it only by offering "clear and convincing reasons that are supported by
10 substantial evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

11 "However, the ALJ need not accept the opinion of any physician, including a
12 treating physician, if that opinion is brief, conclusory, and inadequately supported
13 by clinical findings." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
14 (9th Cir. 2009) (internal quotation marks and brackets omitted). "If a treating or
15 examining doctor's opinion is contradicted by another doctor's opinion, an ALJ
16 may only reject it by providing specific and legitimate reasons that are supported
17 by substantial evidence." *Bayliss*, 427 F.3d at 1216 (citing *Lester*, 81 F.3d at 830–
18 31. The opinion of a nonexamining physician may serve as substantial evidence if
19 it is supported by other independent evidence in the record. *Andrews v. Shalala*,
20 53 F.3d 1035, 1041 (9th Cir. 1995).

1 Perry Grossman, M.D., a pediatrician, testified as an impartial medical
2 expert at Plaintiff's supplemental video hearing on July 9, 2018. Tr. 530-43. Dr.
3 Grossman testified that Plaintiff had arthritis of her hip as a result of congenital
4 dysplasia, and that she would have limitations in running, jumping rope, dancing,
5 and participating in sports, especially team sports. Tr. 535, 537. Dr. Grossman
6 also indicated that Plaintiff and her mother reported that Plaintiff had pain, which
7 could affect her interest in doing things that she otherwise would not mind doing.
8 Tr. 537. He testified that Plaintiff's impairment did not meet, medically equal, or
9 functionally equal the listings. Tr. 537-39. He opined that Plaintiff had a marked
10 limitation in the fourth domain involving moving about and manipulating objects,
11 a less than marked limitation in the sixth domain involving health and physical
12 well-being, and no limitations in the other domains. Tr. 538-39. Dr. Grossman
13 emphasized that Plaintiff had thus far accommodated her impairment very well and
14 recommended that in the future she find things that did not make her stand on her
15 feet for very long. Tr. 540. The ALJ gave great weight to Dr. Grossman's
16 opinion. Tr. 32.

17 Although the ALJ gave great weight to Dr. Grossman's opinion, he
18 misstated and mischaracterized Dr. Grossman's opinion. Tr. 32. The ALJ
19 erroneously determined that Dr. Grossman found no limitations in any of the
20 domains except for less than marked limitations in domains four and six, which

1 involve moving about and manipulating objects and health and physical well-
2 being. Tr. 32. In fact, Dr. Grossman found that Plaintiff had a marked limitation
3 in domain four. Tr. 539. Defendant concedes “the ALJ mistakenly indicated” that
4 Dr. Grossman found a less than marked limitation in domain four, but asserts that
5 this error was harmless. ECF No. 16 at 9. Defendant contends that because
6 Plaintiff did not have marked limitations in two of the functional domains, the
7 ALJ’s error was inconsequential to the disability determination. *Id.* (citing *Molina*,
8 674 F.3d at 1115). While Defendant is correct that Dr. Grossman ultimately
9 concluded Plaintiff did not meet, equal, or functionally equal the listings, ECF No.
10 16 at 9 (citing Tr. 539), and he only found a marked limitation in the fourth
11 domain, the ALJ erred in relying upon the mischaracterized version of Dr.
12 Grossman’s opinion when evaluating Plaintiff’s symptom claims, the lay opinion
13 evidence, the medical opinion evidence, and the functional equivalence domains.
14 Tr. 31-36, 39-40, 539.

15 This error is not harmless. An error is harmful unless the reviewing court
16 “can confidently conclude that no reasonable ALJ, when fully crediting the
17 [evidence], could have reached a different disability determination.” *Stout v.*
18 *Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006). Here, the ALJ’s
19 erroneous interpretation of Dr. Grossman’s opinion as to Plaintiff’s limitations in
20 moving about and manipulating objects led to further errors in weighing the

1 evidence and the opinions of record. First, the ALJ's error in evaluating Dr.
2 Grossman's opinion led to discrepancies in weighing the other medical opinions in
3 the record. Citing Dr. Grossman's "detailed and careful review of the longitudinal
4 record," and noting that he "had the opportunity to consider additional evidence
5 received after the State agency physical consultants['] assessments," the ALJ found
6 that Dr. Grossman assigned the same domain ratings as the State agency physical
7 consultants. Tr. 33. This is not so, as the State agency physical consultants found
8 that Plaintiff had less than marked limitations in domains four and six, and no
9 limitations in any of the other domains. Tr. 141-42, 151-52. Assigning great
10 weight to the opinions of the State agency physical consultants, the ALJ
11 determined that "[t]he convergence in these opinions with the subsequent
12 longitudinal assessment adds greater persuasive effect to the State agency physical
13 consultants' opinions." Tr. 33.

14 The ALJ also cited to Dr. Grossman's opinion when assigning little weight
15 to Plaintiff's treating orthopedic physician, Klane White, M.D., and Plaintiff's
16 treating family medicine physician, Kyle Heisey, M.D. Tr. 33-36. On January 26,
17 2018, Dr. White opined that Plaintiff had marked limitations in domains four, five,
18 and six, which involve moving about and manipulating objects, caring for self, and
19 health and physical well-being, and a less than marked limitation in domain three,
20 which involves interacting and relating with others. Tr. 455-57. The ALJ

1 observed, “it is notable that the pediatric doctors of record, whose specialties are
2 also within an area particularly relevant to [Plaintiff’s] claim, did not find the same
3 marked limitation as did Dr. White.” Tr. 34. Dr. Heisey submitted a domain
4 assessment on February 2, 2018, and provided the same functional domain
5 assessments as Dr. Grossman. Tr. 458-60. Dr. Heisey opined that Plaintiff had a
6 marked limitation in domain four, a less than marked limitation in domain six, and
7 no limitations in the other domains. Tr. 458-60. Despite identifying functional
8 domain assessments that were identical to those opined by Dr. Grossman, the ALJ
9 determined that there was “some alignment” in the domain limitations asserted in
10 Dr. Heisey’s opinion and those of Dr. Grossman and the State agency physical
11 consultants. Tr. 34. The ALJ gave great weight to the areas of Dr. Heisey’s
12 opinion that aligned with the opinions of Dr. Grossman and the State agency
13 physical consultants, “due to consistency with the record including other opinion
14 evidence and the other considerations highlighted above in the analyses of the
15 weight given to the impartial medical expert and the State agency physical
16 consultants’ opinions.” Tr. 34. However, the ALJ assigned little weight to Dr.
17 Heisey’s opinion in the areas where he found greater limitations than Dr.
18 Grossman and the physical State agency consultants. Tr. 34. The ALJ gave
19 some/partial weight to Dr. Heisey’s disability evaluation from February 2, 2018,
20 finding that his opinion was “supportive and generally consistent with the

1 assessment of the State agency physical consultants and the impartial medical
2 expert that although she has less than marked limitation in moving about and
3 manipulating objects and health and physical well-being, she does not meet,
4 medically equal or functionally equal the listings.” Tr. 35-36.

5 The ALJ’s error goes beyond the evaluation of the medical opinion
6 evidence. Next, the ALJ’s error in evaluating Dr. Grossman’s opinion led to
7 discrepancies in considering Plaintiff’s symptom claims and the lay opinion of
8 Plaintiff’s mother. Assigning partial weight to their allegations and hearing
9 testimony, the ALJ determined, “[i]n particular, as explained their allegations are
10 inconsistent with the lesser degree of limitation assessed by the State agency
11 medical consultants and the impartial medical expert in their detailed and carefully
12 considered longitudinal assessments.” Tr. 31. Finally, the ALJ’s
13 mischaracterization of Dr. Grossman’s opinion contributed to the ALJ’s finding
14 that Plaintiff had a less than marked limitation in domain four. Tr. 40.
15 Specifically, the ALJ concluded that only a less than marked limitation was
16 supported in domain four, in part because that finding was “consistent with the
17 longitudinal assessments by the State agency medical consultants and the impartial
18 medical expert.” Tr. 40. Based on this record, the Court cannot confidently
19 conclude that the disability determination would remain the same were the ALJ to
20 properly characterize Dr. Grossman’s fully credited opinion.

1 **B. Other Challenges**

2 Plaintiff raises several other challenges to the ALJ's evaluation of the
3 medical opinion evidence, Plaintiff's symptom testimony, lay witness statements,
4 and the functional equivalence domains. ECF No. 15 at 3-21. However, as
5 discussed *supra*, the ALJ's findings in these areas were all influenced by the ALJ's
6 mischaracterization of Dr. Grossman's opinion as to Plaintiff's limitations in the
7 ability to move about and manipulate objects. Because this case is remanded for
8 the ALJ to properly consider Dr. Grossman's medical opinion, the Court declines
9 to address Plaintiff's other challenge here. On remand, the ALJ is instructed to
10 reconsider all of the medical opinions, reevaluate Plaintiff's symptom claims and
11 the lay witness statements of Plaintiff's mother, analyze the functional equivalence
12 domains based on the new evaluation, and conduct a new sequential analysis.

13 **C. Remedy**

14 Plaintiff urges this Court to remand for an immediate award of benefits.
15 ECF No. 15 at 2, 21; ECF No. 17 at 10-11. "The decision whether to remand a
16 case for additional evidence, or simply to award benefits is within the discretion of
17 the court." *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987) (citing *Stone v.*
18 *Heckler*, 761 F.2d 530, 533 (9th Cir. 1985)). When the Court reverses an ALJ's
19 decision for error, the Court "ordinarily must remand to the agency for further
20 proceedings." *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017); *Benecke v.*

1 *Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (“[T]he proper course, except in rare
2 circumstances, is to remand to the agency for additional investigation or
3 explanation”); *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1099 (9th
4 Cir. 2014). However, in a number of Social Security cases, the Ninth Circuit has
5 “stated or implied that it would be an abuse of discretion for a district court not to
6 remand for an award of benefits” when three conditions are met. *Garrison v.*
7 *Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014) (citations omitted). Under the credit-
8 as-true rule, where (1) the record has been fully developed and further
9 administrative proceedings would serve no useful purpose; (2) the ALJ has failed
10 to provide legally sufficient reasons for rejecting evidence, whether claimant
11 testimony or medical opinion; and (3) if the improperly discredited evidence were
12 credited as true, the ALJ would be required to find the claimant disabled on
13 remand, the Court will remand for an award of benefits. *Revels v. Berryhill*, 874
14 F.3d 648, 668 (9th Cir. 2017). Even where the three prongs have been satisfied,
15 the Court will not remand for immediate payment of benefits if “the record as a
16 whole creates serious doubt that a claimant is, in fact, disabled.” *Garrison*, 759
17 F.3d at 1021.

18 Here, it is not clear from the record that the ALJ would be required to find
19 Plaintiff disabled if all the evidence were properly evaluated. Even if the ALJ
20 were to fully credit Dr. Grossman’s properly characterized opinion, the evidence

1 would still present outstanding conflicts for the ALJ to resolve. Specifically, State
2 agency physicians Nevine Makari, M.D. and Nalini Gupta, M.D., opined that
3 Plaintiff had a less than marked limitation in domain four, Tr. 141-42,151-52, and
4 the ALJ gave these opinions great weight. Tr. 33. Further, Drs. White and Heisey
5 both opined that Plaintiff a had marked limitation in domain four, Tr. 455-57, 458-
6 60, and the ALJ gave these opinions little, some, and partial weight. Tr. 34-36.
7 Therefore, further proceedings are necessary for the ALJ to reconsider all of the
8 medical opinions based on a proper evaluation of Dr. Grossman's opinion. On
9 remand, the ALJ should reconsider all of the medical opinions, along with
10 Plaintiff's symptom testimony and the lay witness statements of Plaintiff's mother,
11 and reevaluate the functional domains.

12 CONCLUSION

13 Having reviewed the record and the ALJ's findings, the Court concludes the
14 ALJ's decision is not supported by substantial evidence and free of harmful legal
15 error. Accordingly, **IT IS HEREBY ORDERED:**

16 1. Plaintiff's Motion for Summary Judgment, **ECF No. 15**, is **GRANTED**.

17 2. Defendant's Motion for Summary Judgment, **ECF No. 16**, is **DENIED**.

18 3. The Clerk's Office shall enter **JUDGMENT** in favor of Plaintiff

19 REVERSING and REMANDING the matter to the Commissioner of Social
20

1 Security for further proceedings consistent with this recommendation pursuant to
2 sentence four of 42 U.S.C. § 405(g).

3 The District Court Executive is directed to file this Order, provide copies to
4 counsel, and **CLOSE THE FILE**.

5 DATED June 11, 2020.

6 s/Mary K. Dimke
7 MARY K. DIMKE
8 UNITED STATES MAGISTRATE JUDGE
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